INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
A. The representation proceedings	2
B. The subsequent Board and court proceedings	6
Argument	8
Conclusion	11

CITATIONS

Cases:

Boire v. *Greyhound Corp.*, 376 U.S. 473	8
National Labor Relations Board v. *Difco Laboratories, Inc.*, 389 F. 2d 663, certiorari denied, 393 U.S. 828	9
National Labor Relations Board v. *National Survey Service, Inc. Co.*, 361 F. 2d 199	9
National Labor Relations Board v. *Ochoa Fertilizer Corp.*, 368 U.S. 318	10
National Labor Relations Board v. *Sun Drug Co.*, 359 F. 2d 408	9
National Labor Relations Board v. *Tower Co., A. J.*, 329 U.S. 324	8
National Labor Relations Board v. *Wyman-Gordon Co.*, 394 U.S. 759	8
Neuhoff Bros., Packers, Inc. v. *National Labor Relations Board*, 362 F. 2d 611, certiorari denied, 386 U.S. 956	9
Pittsburgh Plate Glass Company v. *National Labor Relations Board*, 313 U.S. 146	8

373-196—70

Statutes, rules and regulations:

	Page
Administrative Procedure Act, 5 U.S.C. 551, *et seq*	8
5 U.S.C. 554(a)(6)	9
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 6	8
Section 8(a)(1)	6, 7
Section 8(a)(5)	6, 7
Section 9(c)	8
Section 9(c)(1)	2, 3, 9, 10
Section 10	6
NLRB rules and regulations:	
29 C.F.R. 102.69(c)	3
29 C.F.R. 102.69(d)	4
Miscellaneous:	
1 Leg. Hist. of the Labor-Management Relations Act 1947 (G.P.O. 1948)	9

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 935

THE RIVERSIDE PRESS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 1–24) is reported at 415 F. 2d 281. The Board's decision and order (Pet. App. B 28–44) in the unfair labor practice proceeding are reported at 169 NLRB No. 107. The decisions in the related representation proceeding are set forth at R. 6–10, 42–45, 68–72.[1]

[1] "R." references are to the materials printed in Volume 1 of the transcript of record in the court of appeals. "J.A." references are to the portions of the testimony and the exhibits printed in Volume 2 of the joint appendix.

JURISDICTION

The judgment of the court of appeals (Pet. App. B 24–25) was entered on July 11, 1969, and a petition for rehearing was denied on September 11, 1969 (Pet. App. B 23–24). The petition for a writ of certiorari was filed on December 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's procedure for resolving post-election issues is authorized by the National Labor Relations Act.

2. Whether the employer, by failing to contest the propriety of the Board's substantive findings in the court of appeals, waived his right to obtain full judicial review of those findings.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix A to the petition (pp. 1–5).

STATEMENT

A. THE REPRESENTATION PROCEEDING

On June 16, 1966, Local 267, Dallas-Fort Worth Lithographers and Photoengravers International Union, AFL–CIO, filed a representation petition with the Board's Regional Director pursuant to Section 9(c)(1) of the National Labor Relations Act (Pet. App. A 1–2) seeking an election with respect to certain of the Company's employees (R. 1–5). Following

a preelection hearing held under that section[2] to determine the appropriate unit, the Regional Director directed an election in a unit of the Company's Dallas lithographic production employees (R. 6–10). On September 27, 1966, the election was held; 26 votes were cast for the Union, 22 against, and an additional 4 ballots were challenged by the Union on the ground that the prospective voters were supervisors and hence excluded from the unit.

The Act makes no explicit provision for a post-election procedure. Under its authority under Section 6 of the Act "to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act," the Board long ago established such a procedure. Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. 102.69(c)) provides that, "if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such * * * challenges," and then "issue a decision disposing of the issues and directing appropriate action or certifying the results of the election." Such "action by the regional director may be on the basis of an administra-

[2] Section 9(c)(1) provides that, upon the filing of a representation petition:

> * * * [T]he Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

tive investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer." The Rules further provide (29 C.F.R. 102.69 (d)) that the hearing shall be conducted in accordance with the procedure governing pre-election hearings, "except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues." The Rules further provide that, where such a report is prepared and served, any party may "file with the regional director * * * exceptions to such report, with supporting brief, if desired" (*ibid.*).

Pursuant to these rules, the Regional Director conducted an administrative investigation, and on that basis overruled the Union's challenges to two of the ballots and directed that they be counted (R. 42–45). He also directed that, if the results of the election were still inconclusive after the two ballots were counted, a hearing be held before a hearing officer to be designated by him to determine the supervisory status of the two other voters—Marjorie Wiley and Andrew Schilling (R. 45). Both ballots were opened and found to have been cast against the Union; an employee of the Regional Office was designated as hearing officer to hear the issues and "to prepare and serve upon the parties a report concerning the resolu-

tion of credibility of witnesses, findings of fact, and recommendations" (R. 48).

At the post-election hearing, all parties "were afforded full opportunity * * * to examine and cross-examine witnesses and to introduce evidence" (R. 48). The hearing officer's report of the hearing found that both Wiley and Schilling were supervisors within the meaning of the Act, and accordingly recommended that the challenges to their ballots be sustained (R. 46–57). The Company filed exceptions with the Regional Director, challenging the substantive basis of the hearing officer's findings but not the propriety of the hearing procedure (R. 58–67). The Regional Director agreed with the Company that Wiley was not a supervisor, but sustained the Union's challenge to Schilling's ballot (R. 68–71).[3] Since the exclusion of Schilling's ballot gave the Union a majority among the unit employees voting, the Regional Director certified the Union as the exclusive bargaining representative of the Company's lithographic employees (J.A. 71).

[3] The Regional Director made the following findings: Schilling was the "foreman of the platemaking department," and was "responsible for platemaking" (R. 51; J.A. 154, 163). He assigned work to the other platemakers, instructed them on what to do, and checked their work (R. 52; J.A. 159–160). He also checked their timecards in conjunction with authorizing overtime (R. 52; J.A. 159, 195–196). Together with the supervisor of the pressroom, Schilling determined whether defective plates should be rejected or reworked (R. 52; J.A. 159–160). Finally, Schilling's responsibilities were accentuated by the circumstance that Lunt, admittedly a supervisor of the platemaking department, lacked the technical knowledge to oversee the internal operations of the section (R. 53; J.A. 166–167).

The Company requested the Board to review the Regional Director's decision, challenging the substantive basis of his ruling on Schilling; again it raised no question as to the propriety of the post-election hearing procedure (R. 73–94). The Board denied the request on the ground that it raised no substantial issues warranting review (R. 95).

B. THE SUBSEQUENT BOARD AND COURT PROCEEDINGS

The Company refused to bargain with the Union, the Union filed charges, and the General Counsel of the Board issued a complaint alleging that the Company had violated Section 8(a) (5) and (1) of the Act (R. 96–98, 99–105). After the Company answered (R. 106–107), the General Counsel moved for judgment on the pleadings (R. 108–114), and the Trial Examiner issued an order to show cause why the motion should not be granted (R. 116–117). In response, the Company proffered no new evidence, but contended that it was nonetheless entitled to relitigate the supervisory status of Schilling before a Trial Examiner in an unfair labor practice proceeding under Section 10 of the Act (R. 122–123).

The Trial Examiner concluded that, since there was no proffer of newly discovered or previously unavailable evidence, the Company was not entitled to relitigate issues previously determined in the representation proceedings (Pet. App. B 36). He added that the Company was estopped from questioning the legality of the hearing on challenges since it had requested

such a hearing initially[4] and had failed to except to the Regional Director's supplemental decision on procedural grounds (Pet. App. B 35–36). The Examiner accordingly granted the General Counsel's motion for judgment on the pleadings, found that the Company had violated Section 8(a) (5) and (1) of the Act, and recommended that the Company be ordered to bargain with the Union (Pet. App. B 37, 39–41). The Board adopted the Examiner's findings, conclusions, and order (Pet. App. B 43–44).

The court of appeals rejected the Company's contention that the procedure utilized by the Board to resolve the challenges was not authorized by the Act (Pet. App. B 3–7). The court (with Judge Godbold dissenting) further held that, since the Company had not challenged the Board's substantive finding respecting Schilling's supervisory status before the court—in its petition to review the Board's order, its brief, or in oral argument—it had in effect "waived" its right to obtain full judicial review of that issue (Pet. App. B 7–8). Accordingly, on finding that the Board had jurisdiction to make its order and "had not traveled outside the orbit of its authority," the court enforced that order (Pet. App. B 8–9).

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[4] On September 30, 1966, counsel for the Company, by letter in the nature of a brief to the Regional Director, contended that the challenges should be overruled on the ground that the voters involved were not supervisors, but urged further that, if the Regional Director disagreed with the Company's position, he should "designate a hearing officer and schedule a hearing for the purpose of determining the status of the employees whose ballots were challenged" (Pet. App. B 29–30).

ARGUMENT

1. Petitioner's basic contention is that the Board lacks statutory authority to hold a post-election hearing on challenges to voter eligibility, and that, even if the Board has such authority, the Company was entitled to relitigate the issue in an unfair labor practice proceeding before a Trial Examiner appointed in conformity with the requirements of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*).

Although the Act does not expressly provide for post-election hearings in a representation proceeding, the Board's rule-making authority under Section 6 of the Act, *supra,* and its wide discretion in fulfilling its Section 9(c) function of certifying election results (see *National Labor Relations Board* v. *A.J. Tower Co.,* 329 U.S. 324, 330; *National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759, 767), confer ample power to provide for such a hearing by rule. Such rules have long been in force, and are an established part of Board practice (Pet. App. B 4).

Where an unfair labor practice proceeding is simply a means of enforcing the Board's determination in a representation case,[5] the two proceedings "are really one" and "a single trial of the [representation] issue [is] enough." *Pittsburgh Plate Glass Company* v. *National Labor Relations Board,* 313 U.S. 146, 158, 162. Accordingly, the Board's rule, that issues decided

[5] An employer can obtain review of a Board representation determination in the court of appeals only by refusing to bargain, and thereby triggering an unfair labor practice proceeding. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473.

in a representation case may not be relitigated in an unfair labor practice proceeding absent extraordinary circumstances, has won uniform judicial approval. *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 201–202, 204, 206 (C.A. 7); *Neuhoff Bros., Packers, Inc.* v. *National Labor Relations Board*, 362 F. 2d 611, 612–613 (C.A. 5), certiorari denied, 386 U.S. 956; *National Labor Relations Board* v. *Difco Laboratories, Inc.*, 389 F. 2d 663 (C.A. 6), certiorari denied, 393 U.S. 828; *National Labor Relations Board* v. *Sun Drug Co.*, 359 F. 2d 408 (C.A. 3). Nor does this involve a circumvention of the Administrative Procedure Act, for representation proceedings are exempted from the formal hearing requirements of that Act (5 U.S.C. 554(a)(6)).

Finally, there is no merit to petitioner's contention (Pet. 10) that, even if otherwise appropriate, the Board's post-election hearing must be subject to the limitation which Section 9(c)(1) imposes on pre-election hearings—namely, the hearing officer "shall not make any recommendations with respect [to the issue tried]." The basic reason for this limitation at the pre-election stage is that the hearing officer's report is purely an internal document prepared for the aid of the Board, and it is not served on the parties. See 1 Leg. Hist. of the Labor Management Relations Act 1947 (GPO, 1948) 431, 495–496. The hearing officer's report at the post-election stage is served on the parties, and thus they have an opportunity to contest his recommendations. The Board

was accordingly justified in not applying to post-election hearings the limitation which Section 9(c)(1) imposes on pre-election hearings. Moreover, as the court below properly noted (Pet. App. B 5–6), the limitation on pre-election hearings has been rendered virtually meaningless by the 1959 amendment to Section 3(b) (Pet. App. A 1), which permits the Board to delegate its powers under Section 9 to its regional directors, subject to a discretionary right of review; "the Board need not apply a dead letter law to post-election hearings, where it does not literally apply" (Pet. App. B 6).

2. There is no substance to petitioner's further contention (Pet. 20–23) that the court of appeals was required, *sua sponte,* to exercise plenary review over the Board's substantive finding respecting Schilling's supervisory status. Although it raised the substantive issue before the Board, petitioner did not do so at any time before the court of appeals (see Pet. App. B 10). In these circumstances, it is just as though petitioner had consented to the entry of an enforcement decree, if its procedural contention were overruled. Where there has been consent to the entry of a decree, the reviewing court need satisfy itself only that the Board has not "patently traveled outside the orbit of its authority." *National Labor Relations Board* v. *Ochoa Fertilizer Corp.,* 368 U.S. 318, 322. The court below correctly concluded that the Board had not done so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ELLIOTT MOORE,
Attorney,
National Labor Relations Board.
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